

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i

File No.: HA-3480
180-Day Exp. Date: February 7, 2009

December 12, 2008

**Board of Land and
Natural Resources
State of Hawai'i
Honolulu, Hawai'i**

REGARDING: Conservation District Use Application (CDUA) HA-3480
Subdivision of One Lot into Two

APPLICANT: Charles Anderson & Terry Harrison

AGENT: Gregory R. Mooers, Mooers Enterprises LLC
PO Box 1101, Kamuela, HI 96743

LOCATION: `Ainakea, North Kohala, Hawai'i

TMK: (3) 5-3-06:21

AREA OF PARCEL: 333.09 acres

AREA OF USE: same

SUBZONE: Resource

DESCRIPTION OF AREA:

The 333-acre subject parcel runs approximately 840 meters along the shoreline, and 1600 meters inland. The Conservation District boundary runs approximately 100 meters parallel to the shore.

The parcel was once cultivated in cane, but is currently undeveloped and is predominately dryland coastal scrub. The shoreline is a steep 60'-80' eroding rock and earth seacliff. There are no sandy beaches. Kapa`au Gulch runs along the western border of the property.

There is an existing public lateral easement along the top of the cliff. There are no other known encumbrances, easements, or restrictions on the property.

Fishermen, gatherers, and other members of the community use the public access along the cliff top; they use rope ladders tied to trees on the cliff to descend to the rocky shoreline. The community has indicated that they consider the area an important cultural resource.

Exhibit 1 shows the subject parcel.

PROPOSED USE:

The applicants are proposing to consolidate and subdivide eight lots of record; of these, one has a portion located in the Resource Subzone of the State Land Use Conservation District. The proposed subdivision would result in this lot, TMK (3) 5-3-06:21, being split into two lots.

Exhibit 2 shows the proposed lots within the Conservation District.

Exhibits 3 and 4 show the shoreline area.

This would increase the number of parcels in the Conservation District from one to two. This would put the proposal in violation of Hawai'i Revised Statutes (HRS) §13-5-30 PERMITS, GENERALLY, Criterion 7: *Subdivision of land will not be utilized to increase the intensity of land uses in the Conservation District.*

To remedy this, the applicants propose to record a deed restriction on the proposed two lots (Lots 14-B and 14-D) that would prohibit any construction within the Conservation District.

No development is being proposed in this application.

SUMMARY OF COMMENTS:

The Office of Conservation and Coastal Lands referred the application to the following agencies for review and comment: Office of Hawaiian Affairs; the Hawai'i County Planning Department; Hawai'i County Department of Public Works; Hawai'i Board Member; and the Department of Land and Natural Resources (DLNR) Land Division, Division of Forestry and Wildlife, & Historic Preservation Division.

A notice of the application was placed in the Office of Environmental Quality Control's *Environmental Notice* on August 23, 2008. In addition, a copy was available for review at the Kailua-Kona Public Library.

Comments were received from the following agencies:

County of Hawai'i Department of Public Works

No comments.

DLNR – Division of Forestry and Wildlife

No comments

DLNR – Land Division

No comments.

DLNR – Historic Preservation Division (HPD)

HPD feels that no historic properties will be affected by the development as the applicant promises to place a deed restriction prohibiting development in the Conservation District. HPD notes that this does not take the place of any historic preservation reviews in the future for this or neighboring parcels.

Deborah Chang (Community Member)

Ms. Chang raised several questions and concerns:

- She asks if allowing subdivision with a deed restriction would be setting precedent¹;
- She asks how “development” will be defined in the deed restriction, and notes that many common improvements, such as rock walls, pools, and gardens, might be not be considered development;
- She asks when the negotiated lateral shoreline access be open for public use, and notes that other public access easements in the area remain effectively closed to the public as the County will not accept liability, maintenance, or control over the easements;
- She asks what happens to public access when the cliff migrates mauka;
- She asks that there be a public review component to the public access negotiations; and
- She asks that the Special Management Area be extended to cover the entire parcel if the subdivision is approved.

Applicant's Response

The proposed deed restriction brings the subdivision into compliance with Hawai'i Administrative Rules regarding subdivision.

The landowner is willing to grant a lateral public easement along the shoreline, and this will be shown on the final plat map given to the Planning Department. The applicant agrees that the width of the easement should take erosion into account, and the alignment can be relocated if erosion does occur.

The concerns regarding the Council's inaction regarding public easements in North Kohala are best addressed to the Planning Director and County through the SMA process; it is neither the applicant's nor OCCL's responsibility to amend or defend the process.

¹ OCCL notes that the BLNR has approved other permits with similar provisions, and that this proposal would not be precedent setting.

The Conservation District on this parcel is already entirely within the SMA

Toni Withington (Community Member, Kamakani O Kohala 'Ohana – Kako'o)

Ms. Withington pointed out what she saw as “major flaws” in the application. These are that the application:

- Ignores significant public access interest in the area, including the use of a mauka-makai road that cuts across the property from the bottom of the 'Āinakea neighborhood.
- Doesn't locate the controversial lateral shoreline trail which was negotiated with the County Planning Department but without community or user input.
- Gives promises of deed restrictions that are too vague;
- Paints a confusing picture of the subdivision which doesn't comply with SMA rules;
- Is incomplete according to the rules governing CDUA's;

Applicant's Response

The applicant's response on easements, the SMA, and HAR mirrored his response to Ms. Chang, above.

The applicant also added that the Council has accepted similar lateral access agreements in the past, and sees no reason why this will not happen again.

The applicant feels that the accusation that the CDUA is misleading or confusing is unwarranted. He notes that no developments are being proposed in this application.

The applicant strongly disagrees that there is a mauka-makai trail/road on this parcel. He notes that there are similar roads in the region, but none on this parcel due to 30 years of cattle operation and its associated fencing.

ANALYSIS:

Following review and acceptance for processing, OCCL notified the applicant's by letter dated August 18, 2008, that:

1. The consolidation and re-subdivision was an identified land use within the Conservation District, pursuant to Hawai'i Administrative Rules (HAR) §13-5-24 *Identified land uses in the protective subzone, P-11 SUBDIVISION OR CONSOLIDATION OF PROPERTY, (D-1) Subdivision of property into two or more legal lots of record which serves a public purpose and is consistent with the objectives of the subzone.* The final decision as to whether to grant or deny the permits lies with the Board of Land and Natural Resources.
2. Pursuant to HAR §13-5-40 *Hearings*, a public hearing was not required.

3. This project was exempt from conducting an Environmental Assessment pursuant to HAR §11-200-8.

§13-5-30 CRITERIA:

The following discussion evaluates the merits of the proposed land use by applying the criteria established in HAR §13-5-30.

- 1) *The proposed use is consistent with the purpose of the Conservation District.*

The objective of the Conservation District is to conserve, protect and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

The proposed subdivision does not entail any new land use, nor does it create the potential for new land uses, and therefore does not conflict with these objectives.

- 2) *The proposed land use is consistent with the objectives of the Subzone of the land on which the use will occur.*

Pursuant to HAR §13-5-14 the objective of the objective of the Resource Subzone is to designate open space where specific conservation uses may not be defined, but where urban use may be premature.

The proposal does not involve a change in land use, nor will it create the potential for a change in land use. As the land owner will be placing deed restrictions on the Conservation portions of the two new lots the proposal will not lead to increased urbanization of Conservation District land.

- 3) *The proposed land use complies with the provisions and guidelines contained in Chapter 205A, HRS entitled "Coastal Zone Management", where applicable.*

The Hawai'i County Planning Department has determined that the proposal is exempt from the definition of development, and will not need a Special Management Area permit

- 4) *The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region.*

The subdivision does not involve a land use.

- 5) *The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels.*

The subdivision does not involve a land use.

- 6) *The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.*

The action shall have no physical impact on the land. Therefore staff is of the opinion that the natural beauty and open space characteristics of the portions of the lots within the Conservation District will be maintained.

- 7) *Subdivision of land will not be utilized to increase the intensity of land uses in the Conservation District.*

The subdivision will increase the number of potentially developable lots in the Conservation District from one to two. The landowners are willing to put a deed restriction on the Conservation District portions of these two lots prohibiting development. This will, in effect, reduce the number of developable lots in the District from one to zero.

- 8) *The proposed land use will not be materially detrimental to the public health, safety and welfare.*

Staff is of the opinion that the proposed subdivision will not be materially detrimental to the public health, safety and welfare.

DISCUSSION:

The applicants are proposing to subdivide a parcel of land that is partially in the Conservation District. The Conservation District boundary runs approximately 300 feet from the shoreline in this ahupua'a. The proposal would create two lots that are partially in the Conservation District.

The proposal thus has the potential to increase the intensity of land use. To mitigate this, the landowners are willing to place deed restrictions on the two new lots which would prohibit any construction in the Conservation District portion of the lands. This would, in effect, reduce the number of developable lots in the Conservation District from one to zero.

OCCL supports this mitigation measure in that it decreases the potential for development in the Conservation District.

The coastal area is marked by a rocky and uneven coast bounded by an eroding 60-foot cliff. Recreation users, fishermen, and gatherers are active users of this coast; they access the shore via rope ladders tied to trees at the top of the cliff. Per both State and County law, the applicant will be including a lateral public easement along the shore as part of the subdivision.

Community members have raised a significant concern regarding shoreline access. They point out that similar projects in the neighborhood have also promised public access easements, but that these easements become entangled in concerns over liability, responsibility, and maintenance; they say that the County Planning Department has not released a public easement agreement in North Kohala to the Council for approval in over ten years.

Community members also point out that they are close to finishing a management plan that will require mauka-makai access to the shore in this region, and are concerned that this issue has not been addressed fully in the application or by the consultant.

OCCL shares community concerns regarding both mauka-makai and lateral access. As mauka-makai access would involve close to 1700 meters of Agriculture lands and 100 meters of Conservation land, we agree with the consultant that this issue is best addressed through County processes. Agreements regarding access across Agriculture lands will determine the need and or form of the last 100 meters of mauka-makai access on Conservation lands.

The lateral shoreline easements would involve Conservation District lands only, and OCCL is concerned that easement agreements in North Kohala have not been being presented to the Council. OCCL will recommend that the BLNR make a condition of the permit be that the applicant comply with any State or County regulations regarding shoreline access. Recognizing that the formal process might become stalled, we will also recommend that an additional condition be that the landowner not interfere with access along the shoreline while any easement agreements are being worked out.

Staff therefore recommends:

RECOMMENDATION:

Based on the preceding analysis, Staff recommends that the Board of Land and Natural Resources APPROVE this application to subdivide TMK (3) 5-3-06:21 at 'Āinakea, North Kohala, Hawai'i, subject to the following conditions:

- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;
- 2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawai'i harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
- 3) The applicant shall provide a Declaration of Restrictive Covenant on Lots 14-B and 14-D prohibiting any construction within the Conservation District on these lots; this Declaration must meet the approval of OCCL and the State Attorney

General's Office, after which the applicant will file the Declaration with the State Bureau of Conveyances.

- 4) The applicant shall provide documentation (e.g. book and page or document number) that this permit approval with the Restrictive Covenant has been placed in recordable form as a part of each deed instrument;
- 5) The applicant will comply with State and County laws regarding public shoreline access, which shall include both a lateral-shoreline and mauka-makai public access easement;
- 6) The applicant will not interfere with lateral shoreline access while the easement agreement is awaiting approval;
- 7) In issuing this permit, the Department has relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
- 8) The applicant understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
- 9) Where any interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
- 10) The applicant shall obtain the approval of the County of Hawai'i for the consolidation and re-subdivision through the applicable County department;
- 11) Other terms and conditions as may be prescribed by the Chairperson; and
- 12) Failure to comply with any of these conditions shall render this Conservation District Use Permit null and void.


Respectfully submitted,



Michael Cain, Staff Planner

Office of Conservation and Coastal Lands

Approved for submittal:



LAURA THIELEN, Chairperson
Department of Land and Natural Resources

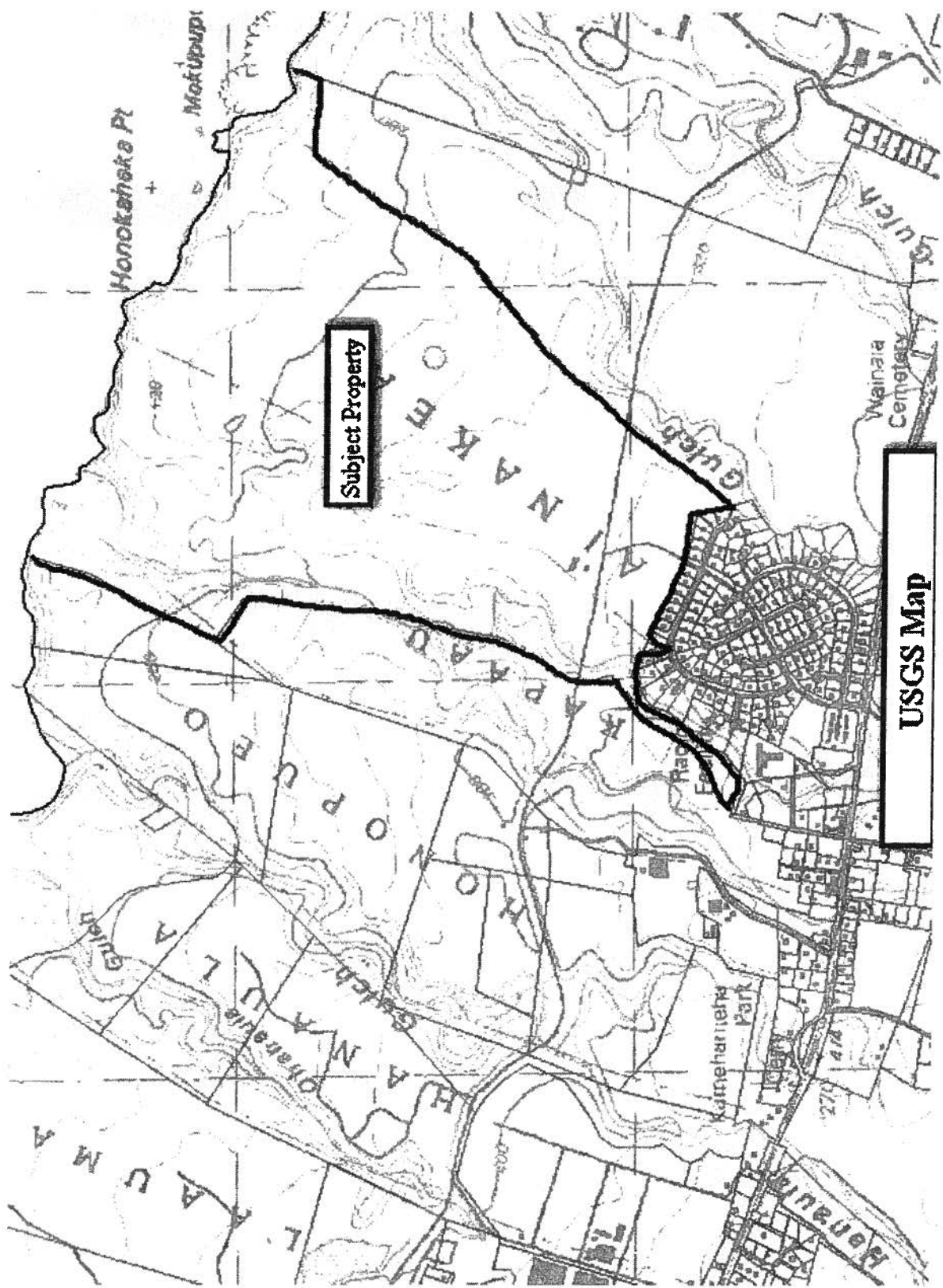
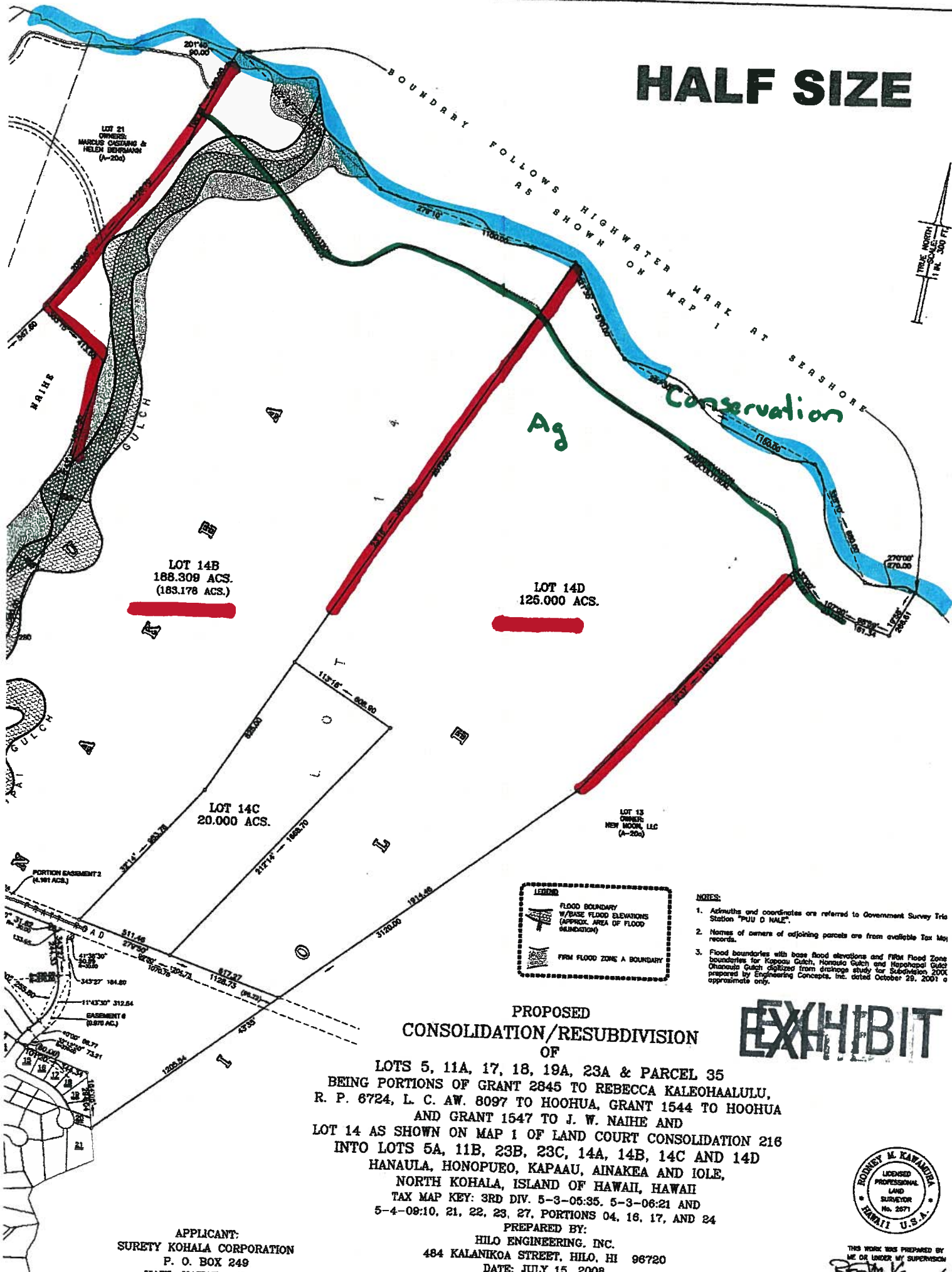


EXHIBIT I

HALF SIZE



PROPOSED CONSOLIDATION/RESUBDIVISION OF

LOTS 5, 11A, 17, 18, 19A, 23A & PARCEL 35
BEING PORTIONS OF GRANT 2845 TO REBECCA KALEOHAALULU,
R. P. 6724, L. C. AW. 8097 TO HOOHUA, GRANT 1544 TO HOOHUA
AND GRANT 1547 TO J. W. NAIHE AND
LOT 14 AS SHOWN ON MAP 1 OF LAND COURT CONSOLIDATION 216
INTO LOTS 5A, 11B, 23B, 23C, 14A, 14B, 14C AND 14D
HANAULA, HONOPUEO, KAPAAU, AINAKEA AND IOLE,
NORTH KOHALA, ISLAND OF HAWAII, HAWAII
TAX MAP KEY: 3RD DIV. 5-3-05:35, 5-3-06:21 AND
5-4-09:10, 21, 22, 23, 27, PORTIONS 04, 16, 17, AND 24
PREPARED BY:

APPLICANT:
SURETY KOHALA CORPORATION
P. O. BOX 249
HAWAII, HAWAII 96749

HILO ENGINEERING, INC.
484 KALANIKOA STREET, HILO, HI 96720
DATE: JULY 15, 2008
JANUARY 8 2009

EXHIBIT 1

- NOTES:
1. Azimuths and coordinates are referred to Government Survey Ties Station "PUU O NAIHE".
 2. Names of owners of adjoining parcels are from available Tax Map records.
 3. Flood boundaries with base flood elevations and First Flood Zone boundaries for Kapaau Gulch, Hanalei Gulch and Hanalei Gulch drainage study for Subdivision 2008 prepared by Engineering Concepts, Inc. dated October 29, 2001 is approximate only.



THIS WORK WAS PREPARED BY
ME OR UNDER MY SUPERVISION
RODNEY M. KAWAHARA

Site Photographs



From Subject Property Looking East



From Subject Property Looking West

Site Photographs



From Subject Property Looking North at Conservation District Area



Kapaau Beach